

## REMARKS

### Non-Responsive Amendment

The Office Communication alleges Applicants' reply filed on October 27, 2004, was not fully responsive to the prior Office Action of August 5, 2004, because the amended claims allegedly now encompass originally non-elected claims. Specifically, the Communication alleges elected claims are drawn to method of detecting viable cells, while non-elected claims are drawn to device and method of quantitating viable cells and total populations of cells and correlating values therebetween. Consequently, the Communication requests Applicants withdraw amended Claims 34-40 and resurrect the claims as they existed prior to the Amendment of October 27, 2004.

Applicants respectfully disagree with the Office Communication and request reconsideration of the allegations set forth in the Communication. In particular, Applicants note the Communication incorrectly states elected claims are drawn to method of detecting viable cells and non-elected claims are drawn to device and method of quantitating viable cells and total populations of cells and correlating values therebetween. Applicants note the Restriction Requirement dated September 30, 2002, classified three invention groups. Group II, which was the group elected by Applicants for continued prosecution as indicated in the Response dated December 19, 2002, consists of original Claims 9-24 and 27-28, drawn to method of quantitating total populations and live cells and kit therefor. Group I, which was not elected by Applicants for continued prosecution in the present application, consists of Claims 1-8, 25-26, and 29-32, drawn to method for determining viability of cells and kit therefor. (See page 2, Restriction Requirement dated September 30, 2002.) At no time have Applicants changed this election.

Applicants note that Claims 34-40 correspond to the original elected Claims 17-19, 22-24, 27 and 28, as discussed in Applicants' Supplemental Amendment dated May 20, 2004. Applicants also note the Office Action that followed the addition of Claims 34-40 to the application did not allege any subject matter was introduced that was drawn to non-elected claims. (See Office Action dated August 5, 2004.) Further, the Office Communication of January 7, 2005, clearly states it was Applicants' most recent Response and Amendment, dated

October 27, 2004, which prompted the allegation of the claims encompassing originally non-elected claims. Therefore, Applicants respectfully request the Examiner precisely point out the language of the claim amendments submitted October 27, 2004, that she considers is not drawn to originally elected claims of method of quantitating total populations and live cells and kit therefor.

For convenience, Applicants have included a Claims Listing herein that is identical to the Claims Listing submitted in the Response of October 27, 2004. Applicants note in the previous Response, Claim 34 was amended for clarification to recite a method for quantitating viable cells compared to total cells in a sample, comprising: providing a sample containing total cells, contacting said sample containing total cells with molecule or dye that is detectably altered by enzymatic activity of a viable cell, detecting a total amount of enzymatically altered molecule or dye, and correlating said total amount with a value that represents the number of total cells in said sample, thereby quantitating viable cells compared to total cells in said sample. Applicants respectfully submit the amended claims are fully encompassed by originally elected claims, and respectfully request reconsideration of the statements made in the Office Communication, continued examination of the pending claims in the present application, and entrance of the fully responsive Amendment timely filed October 27, 2004. Should the Examiner decide this Response does not adequately clarify the original claims elected by Applicants following the Restriction Requirement of September 30, 2002, she is encouraged to contact the undersigned attorney.

Application No. 09/912,266  
Reply to Office Action dated August 5, 2004,  
and Office Communication dated January 7, 2005

The Director is authorized to charge any additional fees due by way of this Amendment, or credit any overpayment, to our Deposit Account No. 19-1090.

All of the claims remaining in the application are now clearly allowable. Favorable consideration and a Notice of Allowance are earnestly solicited.

Respectfully submitted,

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